UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANTHONY HUNTER, Defendant.	Case No. 18-cr-00542-RS-1 **ORDER GRANTING MOTION TO SUPPRESS**

I. INTRODUCTION

Anthony Hunter moves to suppress physical evidence seized during what he characterizes as an illegal search. The United States responds that: (1) Hunter had no legitimate expectation of privacy in the hotel room where the seizure occurred; (2) the police obtained valid consent to enter the hotel room from Hunter's host and girlfriend, Angelita Williams; (3) exigent circumstances justified the entry; and (4) even if unconstitutional, the search was permitted under the attenuation doctrine. An evidentiary hearing was conducted on April 16, 2019 at which both sides offered testimony. For the reasons explained below, Hunter's motion must be granted.

II. BACKGROUND

Hunter is charged in a single-count indictment with violation of 18 U.S.C. § 922(g)(1), felon in possession of a firearm. On October 17, 2018, at 11:45 PM, San Francisco Police Department officers responded to the Kailash Hotel at 179 Julian Street after a reported shooting. In the course of their investigation, police discovered the victim, R.A., visited room #115 before he was shot. After learning this, the police approached Williams, who at the time rented the room

and resided there, and followed her back to her room to ask her questions. After interviewing Williams, Sergeant Jacob Fegan returned to the Night Investigations Unit office and, along with Sergeant Kevin Byrne, reviewed surveillance video from the hotel which showed an unknown male, later identified as Hunter, walking out of and then back into Williams' room shortly after R.A.'s shooting. The video also showed Hunter carrying a handgun and, at one point, leaving room #115 holding a blue shopping bag, walking down a hallway, and entering a bathroom.

Fegan returned to the hotel with Byrne, Officer Glen Wilson, and Officer Bayardo Roman. They searched the bathroom Hunter had entered but found nothing. At 1:45 AM on October 18, the police knocked on the door to room #115 and Williams answered. Fegan informed Williams they wanted to ask follow-up questions about the hotel surveillance video. The parties dispute whether Fegan asked Williams if the officers could enter the room and if Williams consented to their entry. In particular, Hunter does not dispute that Williams agreed to continue speaking with the officers, but contends she told Fegan to "hold on," and she backed away from the door to grab her coat in order to continue the conversation in the hallway and not in her room.

The parties further dispute whether the officers were afforded a wide enough view for Fegan and Wilson to be able to spot a white tennis shoe on the floor of Williams' room which was similar to the shoes Hunter was wearing in the surveillance video. The police entered the room, where they noticed movement in the room's closet. A search of the closet revealed Hunter hiding under bags and clothes. He was subsequently arrested, and a loaded magazine was found in his pants pocket. Fegan asserts Hunter spontaneously admitted that he had a federal warrant for his arrest and that he was on federal probation. Fegan read Hunter his *Miranda* rights, after which Hunter waived his rights and admitted he had a handgun earlier in the evening. A computer search confirmed the arrest warrant. Hunter was transported to Mission Station, where the firearm at issue was discovered in his pants.

III. DISCUSSION

A. Standing

The Government first challenges Hunter's "standing"[1] to bring the current motion under the Fourth Amendment. To invoke Fourth Amendment protection for a search, a person must demonstrate a "legitimate expectation of privacy." *United States v. Gamez-Orduno*, 235 F.3d 453, 458 (9th Cir. 2000) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). In another's home, an overnight guest has a legitimate expectation of privacy, see *Minnesota v. Olson*, 495 U.S. 91, 96-99 (1990), but an individual merely "present with the consent of the householder" does not, *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). To demonstrate a "legitimate expectation of privacy," a defendant must show that he had an actual subjective expectation of privacy in another's home, and that society is prepared to recognize that expectation. *United States v. Davis*, 932 F.2d 752, 756 (9th Cir. 1991); *see also United States v. Armenta*, 69 F.3d 304, 308 (9th Cir. 1995) ("[Defendant's] bald assertion that he was an overnight guest . . . is not sufficient to establish that he had a legitimate expectation of privacy in the house."). "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas*, 439 U.S. at 130 n.1.

As established in Williams' two declarations, Williams rented the hotel room at issue and was (and remains) Hunter's girlfriend. (Williams First Declaration ("WFD") ¶¶ 1-2; Williams Second Declaration ("WSD") ¶¶ 1-2.) The evidence established the two often resided together and did so on the evening of October 17, 2018 and morning of October 18, 2018 at room #115 at the time the police arrived at 1:45 AM. (WSD ¶ 2.) The Government offers nothing to the contrary and, indeed, Hunter was found in Williams' hotel room shortly after that time. As such, Hunter has demonstrated his status as a regular overnight guest.

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[1] The term "standing" is often used to describe an inquiry into who may assert a particular Fourth Amendment claim. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978). Fourth Amendment standing, however, is not the same as standing under Article III. *Id.* Rather, it is a matter of substantive Fourth Amendment law; to say that a party lacks Fourth Amendment standing is to say that *his* reasonable expectation of privacy has not been infringed. *See id.*

Moreover, none of the cases relied upon by the Government relate to the facts at issue here. In *Nadell v. Las Vegas Police*, 268 F.3d 924, 928 (9th Cir. 2001), *abrogated on other grounds as recognized in Beck v. City of Upland*, 527 F.3d 853, 862 n.8 (9th Cir. 2008), the homeowner and plaintiff were not in a romantic relationship and the plaintiff was merely present with the homeowner's consent with no intention to remain overnight (intending to remain only long enough to regain sobriety to drive). In the remaining cases, *United States v. Armenta*, 69 F.3d 304, 308 (9th Cir. 1995), *United States v. Carr*, 939 F.2d 1442, 1445-46 (10th Cir. 1991), and *United States v. Gonzales-Barrera*, 288 F. Supp. 2d 1041, 1049-50 (D. Ariz. 2003), none of the defendants offered proof that they had permission from an authorized host to occupy the searched premises. Hunter had a legitimate expectation of privacy in Williams' hotel room and therefore has standing to bring this motion.

B. Consent

Hunter argues suppression of the firearm and magazine are necessary because Williams did not consent to the officers' entry into her hotel room. The Government counters that Williams gave clear and affirmative verbal consent. Warrantless searches by law enforcement are presumptively unreasonable. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001); *see also Stoner v. California*, 376 U.S. 483, 490 (1964) (holding homes and hotel rooms receive equal constitutional protection). An exception exists where a warrantless search is conducted pursuant to valid consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). The government bears the burden of proving consent. *United States v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009). For consent to be valid, it must be voluntary. *Schneckloth*, 412 U.S. at 222. Voluntariness is "determined from the totality of all the circumstances." *Id.* at 227. Consent may be implied from words or conduct that could reasonably be viewed as such. *United States v. Bojorquez-Rojo*, 135 F. App'x 127, 129 (9th Cir. 2005) (citing *Pavao v. Pagay*, 307 F.3d 915, 919-21 (9th Cir. 2002)). Consent is "not lightly to be inferred," however, and is a question of fact to be determined from the totality of the circumstances. *Id.* (quoting *United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir. 1979)).

The Government has failed to establish that Williams consented to the officers' entry into

her hotel room on the morning of October 18. First, none of the police officers who came to Williams' room could remember what Fegan actually said to Williams to request entry. At the evidentiary hearing, Fegan testified that he could not remember his own words. Byrne, who was standing to Fegan's left next to the door, similarly testified that he could not remember Fegan's actual words. While Roman and Wilson, who were behind Fegan and Byrne, testified that they remembered Fegan asking "Can I come inside and talk to you," or "Can we come inside to talk," their location behind Fegan who along with Byrne had no such specific recall, reduces the reliability of their testimony.

Next, none of the testifying officers could remember what Williams actually said in reply. Significantly, none of the officers could specifically contradict Williams' assertion that she told Fegan to "hold on." While the Government advanced various arguments as to why Williams should be discredited, considering the totality of the circumstances her testimony was credible.

C. Exigent Circumstances

The Government makes the alternative argument that exigent circumstances gave the police cause to enter and search Williams' room without a warrant. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967). "Exigent circumstances are present when a reasonable person [would] believe that entry . . . was necessary to prevent physical harm to the officers or other persons . . . ." *United States v. Alaimalo*, 313 F.3d 1188, 1192-93 (9th Cir. 2002) (internal quotation marks and brackets omitted). "Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home. Probable cause requires only a fair probability or substantial chance of criminal activity, and [courts] determine the existence of probable cause by looking at the totality of the circumstances known to the officers at the time." *Id.* at 1193 (internal quotation marks and citations omitted).

The Government insists exigent circumstances were present. In its view, the police viewed surveillance video of an unknown man (later identified as Hunter) wearing white tennis shoes

carrying a gun from Williams' room shortly after R.A.'s shooting. When the police arrived at Williams' room in a high-crime area at 1:45 AM, they did not know where the then-unidentified Hunter or his gun were located. In these circumstances, when Fegan saw a white tennis shoe in Williams' room after she opened her door, it was reasonable for him to think that: (1) the man was still armed and hiding in the room; (2) he posed a risk to the police standing outside of Williams' door; and (3) entering Williams' room was necessary to prevent physical harm to the officers. *Bailey v. Newland*, 263 F.3d 1022, 1032-33 (9th Cir. 2001). The Government further contends the police had probable cause to believe the man in the surveillance video violated California laws prohibiting the carrying of firearms in public and that there was a fair probability that the evidence of those crimes, the gun, would be found in Williams' hotel room.

Once more, the Government fails to proffer evidence to support its assertions. First, it is too far of a stretch to argue exigent circumstances continued to exist on the premises two hours after the police first responded to the shooting. This was not an ongoing emergency situation, nor were the police in hot pursuit of a subject. The police had departed the premises after the initial investigation and the victim of the shooting was gone. Indeed, Fegan admitted at the evidentiary hearing that the surveillance footage gave him no cause to believe Hunter was the shooter. Further, it is unreasonable to conclude that the surveillance footage gave the police reason to believe Hunter was in Williams' hotel room two hours after the shooting. For all the officers knew, Hunter could well have fled the area during that time. This distinguishes the situation from *Bailey*, where the police *knew* a potentially armed individual was in the hotel room at issue.

Moreover, the Government does not offer persuasive evidence to establish that any officer noticed a white tennis shoe in Williams' room, thereby giving them reason to believe Hunter was inside. Although both Fegan and Wilson testified to seeing a white tennis shoe in Williams' room after she opened her door, Byrne's testimony is to the contrary in several important respects. The inconsistency between those officers' testimony call the Government's assertion of the location of the shoe into question.

The presence or absence of the white shoe aside, none of the officers testified to

performing a protective sweep of Williams' room upon entry. In fact, the testimony suggests the opposite: Fegan testified that he was continuing his conversation with Williams after entry, Byrne admitted there was no need for him to enter the room after Fegan entered, and Wilson testified that multiple minutes passed between the entry of Fegan and Byrne and any officer drawing a weapon. If the officers had reason for concern they were entering a room that was potentially harboring an armed individual, the fact that they did not conduct a protective sweep immediately upon entry casts further doubt they connected a white shoe on the floor of Williams' room to Hunter prior to entry. Considering the totality of the circumstances, there were no exigent circumstances to justify the police officers' entry into Williams' room.

D. Attenuation Doctrine

The Government's final argument is that the attenuation doctrine as expounded in *Utah v. Strieff*, 136 S. Ct. 2056 (2016) applies in this case and absolves any constitutional defects arising from the search of Williams' room and ultimately Hunter's person. The attenuation doctrine holds that otherwise improperly seized "[e]vidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, such that the 'interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Strieff*, 136 S. Ct. at 2061 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). Three factors are relevant to the attenuation doctrine analysis. First, courts examine the "temporal proximity" between the challenged police conduct and the discovery of the challenged evidence. *Brown v. Illinois*, 422 U.S. 590, 603 (1975). Second, courts consider "the presence of intervening circumstances." *Id.* at 603-04. Third, courts look at "the purpose and flagrancy" of the challenged police conduct. *Id.* at 604. According to the Government, Hunter's preexisting, independently issued arrest warrant excuses the officers' unconstitutional entry into Williams' room.

As an initial matter, the Government concedes the first *Brown* factor favors Hunter. With regard to the second *Brown* factor, the Government asserts the officers' discovery of Hunter's valid, preexisting arrest warrant is an intervening circumstance that justifies the warrantless search

of Williams' apartment and subsequently Hunter's person. The Government draws parallels to *Strieff*, where the police: (1) learned that the defendant had a valid arrest warrant during the challenged stop/seizure; (2) arrested the defendant on that warrant; and (3) found the challenged evidence in a search incident to the defendant's lawful arrest. *Strieff*, 136 S. Ct. at 2062-63.

Strieff, however, addressed an *investigatory stop on a sidewalk*, not a warrantless search of a residence that leads to the inadvertent discovery of a person with an arrest warrant. *See id.* at 2060. In *Strieff*, while the investigatory stop was unsupported by reasonable suspicion, it led to the discovery of an arrest warrant that would have fully authorized the search that led to the contraband, thereby excusing the unconstitutional stop. *Id.* at 2062-63. Both the Supreme Court and the Ninth Circuit recognize searches of the home as constitutionally separate and distinct from investigatory stops. *See Payton v. New York*, 445 U.S. 573, 590 (1980); *United States v. Albrektsen*, 151 F.3d 951, 953 (1998). Unlike stops of persons on the streets, which are permissible under all circumstances when officers have knowledge of an arrest warrant against that person, arrest warrants standing alone do not give the police carte blanche to search a residence. *See Albrektsen*, 151 F.3d at 953-55. Even with advanced knowledge of an arrest warrant, police must demonstrate they had some reason to believe that the person sought might live at and be present within the premises before they can cross the threshold into a home to effect the arrest. *See Payton*, 445 U.S. at 603.

Here, the Government has not offered sufficient evidence to establish the police had any reason to believe Hunter was in Williams' room during the early morning hours in question. As discussed above with regard to exigent circumstances, too much time had passed between when the officers observed Hunter in the surveillance footage and when they returned to Williams' room reasonably to believe that Hunter remained on the premises. Indeed, both Fegan and Byrne testified that they returned to Williams' room not to find Hunter but to identify him. Moreover, the evidence taken as a whole does not support the conclusion that an officer noticed a white shoe in Williams' room prior to entry that would justify a reasonable belief a potentially armed Hunter was inside. Without such a reasonable belief, the fact of an outstanding arrest warrant for him is

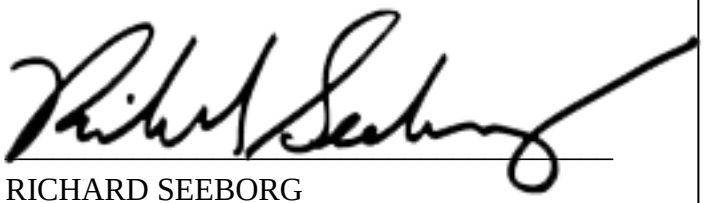
not a sufficient intervening event to justify attenuation of the officers' unconstitutional conduct. Therefore, the physical evidence seized from Hunter must be suppressed.

IV. CONCLUSION

For the foregoing reasons, Hunter's motion is granted. A status conference will be scheduled in this case for June 25, 2019.

IT IS SO ORDERED.

Dated: May 31, 2019



RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California